

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

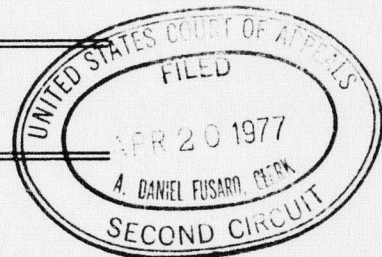
77-7076

United States Court of Appeals
For the Second Circuit

ZIMMEL ASSOCIATES,
a New York Limited Partnership,
Plaintiff-Appellant,
against

WARNER BROS., INC.,
Defendant-Appellee.

APPELLANT'S BRIEF



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Statement of Issues Presented for Review

Whether the court below erred in dismissing the complaint under Rule 12(b)(6) on the grounds that the plaintiff lacked standing to complain of anti-trust violations when (i) plaintiff claimed that it and its property were the targets of the defendant's monopolistic practices; (ii) the plaintiff's losses are measured by a percent of box office gross receipts; and (iii) plaintiff is the only one whose damages are certain.

Statement of the Case

Plaintiff is the owner of the United States rights in and to a motion picture feature film entitled "Beyond the Door." (A 2;29)* Defendant is the owner and distributor of a motion picture entitled "The Exorcist" and a sequel thereto which, for purposes of this case, will be referred to as "Exorcist II." (A 3-4) The stories of plaintiff's film as well as both of the defendant's films are about demonic possession. (A 3;29)

Up until the acts complained of by the plaintiff, its film, "Beyond the Door," was being well received by the public. (A 29) Its gross film rentals as of September 30,

*/ References are to the Appendix.

1976, totalled \$3,356,156. (See Schedule I annexed hereto.) Sales to Cable Television produced an additional \$40,000. The producer's share of the gross film rentals was zero percent of the first \$125,000, 35 percent of the next \$375,000 or \$131,250, 40 percent of the next \$500,000, or \$200,000, and 50 percent of the balance, or \$1,053,078. In addition, the plaintiff's share of cable television sales was 65 percent, or \$26,000. As yet, the film has not been sold for commercial television showing. Plaintiff's share of all lost gross film rentals caused by defendant is 50 percent.

The distributor, in entering into film exhibition agreements with exhibitors, contracts for anywhere from 25 percent to 60 percent of the gross box office receipts. (A3) Thus, the plaintiff's interest in all future tickets purchased by patrons at the box office for "Beyond the Door" would be anywhere from 12 1/2 percent to 30 percent of the gross sales price received from all tickets sold. Even if all of the exhibitors and the distributor lose money as a result of the future showing of "Beyond the Door," the plaintiff is entitled to the same percentage of the proceeds from each ticket sold. The proceeds from commercial television sale or rental is, similarly, a flat percentage rate.

The defendant, in order to clear the market of any competing films on the subject of demonic possession (A 31-2), engaged in a series of lawsuits against theaters showing "Beyond the Door" and other films dealing with the subject of demonic possession (A 4-5), and it has given substantial publicity to its threats to sue any exhibitors who shows "Beyond the Door" on the claim that the film violates the defendant's copyrights for "The Exorcist." (A 5)

That the defendant's contention of copyright infringement is a sham is apparent from the opinion by United States District Court for the Central District of California on a motion for a preliminary injunction in one of the actions filed where the court refused to enjoin the showing of the film. (A 33-42)

The plaintiff has been substantially, and directly, damaged by the defendant's threats to theater owners to sue for copyright infringement. Plaintiff has been advised by its distributor that because of these threats, its plans to rerelease "Beyond the Door" in or about March of 1977 have had to be cancelled. (A 30) Obviously, no exhibitor or television station is going to be willing to "buy a lawsuit." By reason of the defendant's actions, the plaintiff will lose anywhere from 12 1/2 percent to 30 percent of

the gross ticket sales which would have been received had the film been rereleased, plus 65 percent of gross revenue from television network sales.

The plaintiff's loss of earnings is not dependent upon the earnings and profits of either the theater owners, the television networks, or the distributor. Whether or not the exhibitors or the distributor have profits as a result of the showing of "Beyond the Door," plaintiff has suffered injury since it has an interest in a percentage of the gross receipts and not a percentage of the net profits.

Nonetheless the court below interpreted prior decisions of this circuit as holding that under no circumstances could a film owner have standing to sue whenever the film owner chose to distribute the film through a film distributor. (A 48) The plaintiff contends that this was error, a misinterpretation of the prior decisions of this court, in conflict with decisions by other courts, and contrary to the liberal trend of "standing" decisions by the Supreme Court.

Argument

I

PLAINTIFF HAS STANDING TO COMPLAIN OF THE ANTI-TRUST VIOLATIONS DIRECTED AGAINST ITS PROPERTY

The antitrust violation complained of in the complaint is an attempt to destroy plaintiff's motion picture feature film, "Beyond the Door." The defendant took aim and fired at the plaintiff's property and thus the plaintiff has standing to complain under Section 4 of the Clayton Act. Perkins v. Standard Oil Co., 395 U.S. 642, 23 L. Ed., 2d 599, 89 S. Ct. 1871 (1969); Karseal Corp. v. Richfield Oil Corp., 221 F. 2d 358, 364 (9th Cir. 1955).

Section 4 of the Clayton Act (15 U.S.C. §15) states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor...." (Emphasis added)

A great deal has been written about the so-called restrictive view of standing under §4 in the Second Circuit and the so-called more liberal view of standing in other circuits. See notes 64 Columbia Law Review, 570, 69 Harvard Law Review, 575, 49 B. U. Law Review 322, 19 Case Western Reserve Law Review 132, In re Multi-District Vehicle Air Pollution MDL No. 31, 481 F.2d 122 (9th Cir. 1973); International

Railways of Central America v. United Brands Co., 358 F. Supp. 1363 (S.D.N.Y. 1973).

Judge Gurfein in the United Brands case (supra) suggests that the alleged division among the circuits may not be as well defined as some of the commentators observed (358 F.Supp. at page 1371).

The Supreme Court noted in a footnote in its decision in Hawaii v. Standard Oil Co., 405 U.S. 251, 263, 31 L. Ed. 2d 184, 193, 92 Sup. Ct. 885 (1972):

"The lower courts have been virtually unanimous in concluding that Congress did not intend the anti-trust laws to provide a remedy in damages for all injuries that might conceivably be traced to an anti-trust violation."

The "lower courts" have not been "virtually unanimous" as to where to draw the line. Here, the lower court, cited this court's decisions in Productive Inventions, Inc. v. Trico Product Corp., 224 F.2d 678 (1955), cert. den. 350 U.S. 936; Billy Baxter, Inc. v. Coca Cola, 431 F.2d 183 (1970), cert. den. 401 U.S. 923 (1971); Calderone Enterprises Corp. v. United Theaters Circuit, Inc., 454 F.2d 1292 (1971), cert. den. 406 U.S. 930 (1972); SCM Corp. v. RCA, 407 F.2d 166 (1969) cert. den. 395 U.S. 943 (1969); and Lilco v. Standard Oil Co., 521 F.2d 1269 (1975), as setting up certain "categories" of plaintiffs such as landlords and licensors

who are disqualified from having standing to sue under §4, "Zimmel Associates as licensor fits squarely within the category announced by Trico." (A 48). The lower court's view ignored the circumstances pleaded such as the fact that the licensor's property was the target of the anti-competitive practices and its damages were not remote, derivative, duplicative, or speculative. In so holding, the lower court has restricted standing more than any decision either in this Circuit or elsewhere.

In effect, the lower court says that whenever a businessman chooses to subcontract the sale of his product rather than hire his own salesmen, he can never have standing under Section 4. This is not the announced rule in the Second Circuit, and other courts have specifically rejected this theory. Karseal Corp. v. Richfield Oil Corp., *supra*, 221 F.2d at pp. 364-5.

In none of the cases cited by the court below, was the plaintiff's business or property so clearly the target of the anti-competitive practices as here. In Trico and SCM, the patents were not the target. In Billy Baxter, the majority felt the franchisor was not the target although the dissenting judge disagreed. Lilco was far removed from the antitrust violation. In Calderone, the landlord was not the target.

The general use of classifications has been criticized by the Ninth Circuit in In Re Multi-District Vehicle Air Pollution MDL No. 31, supra, 481 F.2d at p. 127, as a:

"regrettable tendency to deny standing to any plaintiff who happens to fall within certain talismanic rubrics: 'creditor', 'landlord', 'lessor', 'franchisor', 'supplier'. This disposition is, we think, unsatisfactory insofar as it transforms judicial inquiry into a mere search for labels." (Emphasis added)

The court in Karseal, supra, 221 F.2d at page 364-5 also criticized this approach saying:

"To say to a manufacturer of wax that he may have the protection of the anti-trust laws in private litigation if he hires salesmen for his product, and not have such protection if he decides to contract with a distributor, would appear to be an unequal application of the law and unjustified dictation as to how he operated his business. We are required to interpret congressional enactments in a manner consistent with their constitutionality, if possible. An interpretation that would read into the statute an unjustifiable restriction as to persons authorized to bring the action might call for invalidation of the statute. The language of the statute does not warrant such restrictive interpretation. The Congress in the Clayton Act, stated in Sec. 4, 'any person who shall be injured...may sue....' (Emphasis added) The Congress did not attempt to limit the relief to those manufacturing or distributing."

The court found that the operation and effect of the illegal practices were on Karseal's products which were distributed through distributors and that, notwithstanding the intervention of a distributor, Karseal and its product, as opposed to the distributor, were the targets of the illegal practice.

In Re Western Liquid Asphalt Cases, 487 F.2d 191, 199-200 (1973), the court reiterated its opinion expressed in Kar-seal that "the presence of intermediaries does not bar recovery." The court went on to observe:

"Thus while we should not impose multiple liability upon defendants, nor give recovery to uninjured plaintiffs, neither should we bar recovery to those who can demonstrate that they bore the burden of the violation."

That is precisely what the contention of the plaintiff in this case is -- namely, that it rather than its distributor was the target since its film and not its distributor's business was the target of the anti-competitive practices complained of.

None of the problems raised by this court in Calderone in support of a restriction on standing in antitrust cases would be presented in the case at bar. First, the court was concerned with remotely situated people who might suffer damages which were "usually much more speculative and difficult to prove than that of a competitor who is an immediate victim of the violation." 454 F.2d at p. 1295. Plaintiff's damages are as direct and calculable as any other potential plaintiff. Indeed, plaintiff's damages are far easier to determine than any other potential plaintiff. The three possible classes of persons injured by the defendant's

action are the plaintiff, its distributor, and the theater or television exhibitors. Under the arrangements between the plaintiff and its distributor and between the distributor and the theaters, the gross receipts are divided by percentage, the theater owner keeps anywhere from 40 percent to 75 percent of the gross proceeds, deducts his expenses, and either has a profit or does not have a profit depending on his other costs of operation. The distributor receives anywhere from 25 percent to 60 percent of the gross ticket sales as his gross film rental which he then shares 50/50 with the plaintiff. The distributor also may or may not have any profit as a result of the defendant's anti-competitive activities since the distributor also has operating expenses and overhead. The plaintiff receives 50 percent of everything that the distributor receives from ticket sales and 65 percent of all gross network television revenue. Since the plaintiff does not have any other business activity, its losses are more likely to be provable than either the distributor or the exhibitors who have overhead and operating expenses which have to be allocated among many other business activities. Thus, the fear of the court in Calderone about so-called "speculative damages" is hardly present in this case.

The next problem which concerned the court in Calderone, was the problem of so-called "overkill" and "duplication of damages." 454 F.2d at p. 1295. Here there cannot possibly be any duplication of damages since the plaintiff's provable losses are only its percentage share of the lost proceeds of sales of tickets and television sales. Its share is not duplicated by either the distributor's profits or the exhibitor's profits. Thus there cannot be any duplication, and there is no "overkill" here.

In the usual situation of the remote plaintiff to which Calderone was addressing itself -- namely, the landlord, stockholder, employee, creditor -- the recovery of damages by the target of the anti-competitive practice is likely to inure to the benefit of the remote plaintiff. In the case at bar a recovery by the plaintiff's distributor will not even theoretically inure to the plaintiff's benefit, since the plaintiff has no right to share in the distributor's profits, and the improvement of the distributor's financial condition does not protect the plaintiff's business interests. Plaintiff's only interest is in a percentage of the gross rentals.

The United Brands case (supra 358 F.Supp. at p. 1370) also involved a situation where the actual target of

the anti-competitive activity was once removed from the repressive conduct, and Judge Gurfein recognized the essentially factual basis governing the issue of standing when he observed that it is not wise to consider these questions "in the abstract" (358 F.Supp. at p. 1373) and that even in Calderone, the court "intimated" that a non-operating landlord may, depending upon the circumstances, have standing. The reference to Calderone, supra, is at 454 F.2d, p. 1296, footnote 3, where this court observed:

"We do not suggest that a non-operating theater lessor may never have standing to sue for treble damages under §4 of the Clayton Act. If Calderone had alleged, for example, that the defendants had aimed their conspiracy at it...Calderone would be in a different posture."

Here, the plaintiff has alleged that the defendant "aimed at it," but the lower court did not see this as putting plaintiff in "a different posture."

Plaintiff contends that its situation is entirely different from the usual situation referred to in the lower court's opinion where anti-competitive practices are aimed against distributors who, as a result, are unable to sell their suppliers' products. In those situations, the real target is the distributor or the distributor's market and the courts have found that the injury suffered by the licensor or supplier was only incidental to and not the principal object of the violation of the law. Here, on the other

hand, removal of the plaintiff's film from the market is the sole and prime object of the defendant's unlawful conduct. There is no showing or suggestion that the defendant's acts were motivated by an intention to injure the business of the plaintiff's distributor. The defendant was trying to destroy the marketability of plaintiff's property so that the film would not be in a position to compete with the defendant's release of "Exorcist II." (A 31-2)

The opinion by the court below shows that it thoroughly failed to consider the nuances of the plaintiff's contention which place it in a position different from usual supplier-licensor case where the distributor is the real target.

Some commentators have advocated a "provable damages" test for standing which, admittedly, goes beyond Calderone. See 19 Case Western Reserve Law Review, 132, 137-8, where the author states that:

"The broadened application of the 'target area' test by the recent cases is a commendable attempt to cut through the maze of oratory and reach the basic question -- what rule is demanded by the policy of the antitrust laws? Bergjans and Hoopes are the two latest examples of courts taking a more analytical approach to the problem and arriving at more satisfactory conclusions.

"It is to be hoped that eventually the only requirement for standing under section 4 will be, as the Supreme Court has indicated, an allegation that the defendant's violation caused pecuniary damage to the plaintiff....Surely the evidentiary

obstacles that a private plaintiff must overcome, in addition to the practical economics of such a suit, are sufficient protection to defendants. It is only by removing or modifying the old restrictions on standing that the policy of the antitrust laws can truly be effectuated."

The author of the note in 64 Col. L. Rev. 570,

586-8 states that:

"Directness has been used as a verbal catchall enabling the courts to avoid the problem actually raised by the facts of the case. As an example, if a plaintiff has suffered damage to his property, his claim should not be dismissed solely because there was an intermediary between him and the violators.

"The purposes of Section 4 are the self-enforcement of the antitrust laws, the deterrent effect of treble damages and the compensation of persons injured by violations. Its purposes are so broad and its mandate so clear that any person who can show that he was damaged should be within the protected class."

He then suggests that the imposition of any limitation should proceed on the basis of the particular facts situation involved in the action with a definite presumption in favor of the plaintiff.

On the subject of the so-called opening of the flood gates, the author observes:

"The area of potential liability would not be as broad as might be feared. The plaintiff would still be required to establish that he suffered damage to a protectable interest and that such damage was in fact caused by the violation. It should always be remembered that the plaintiff is

an innocent party; that he should suffer to spare the wrongdoer is highly questionable",

and finally that

"A remedy that was intended to be an integral part of anti-trust enforcement should not be strictly confined merely to lighten the judicial load."
(64 Col. L. Rev. at p. 588)

While this Court's decision in Calderone indicates that it has not gone as far as those commentators in extending the concepts of standing, surely it does not stand for the automatic disqualification of standing to all "licensors" and "distributors," regardless of the circumstances. The court should remember Judge Cardozo's warning that "metaphors-in-law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it...."

Berkey v. Third Avenue Railway, 244 N.Y. 84, 94 (1926).

The Supreme Court's decisions on standing to challenge an administrative determination by the Comptroller of the Currency, Data Processing Services v. Camp, 397 U.S. 150, 153, 25 L. Ed. 2d 184, 188, 90 S. Ct. 827, 830 (1970), and standing to challenge an administrative determination by the Secretary of Agriculture, Barlow v. Collins, 397 U.S. 159, 164, 25 L. Ed. 2d 192, 198, 90 S. Ct. 832, 836 (1970), to wit:

"Whether the interest sought to be protected...is arguably within the zone of interests to be pro-

tected or regulated by the statute or constitutional guarantee in question." 397 U.S. at p. 153

was adopted as a standard for standing to sue under §4 of the Clayton Act by the District Court of Delaware in Leeward Petroleum Ltd. v. Mene Grande Oil Co., 415 F. Supp. 158, 167 (1976). The District Court's opinion goes on to say:

"It is not the intervening levels of dealing or privity; nor whether the injured party is within the zone of competition which the anti-trust violation was intended to impact....Rather, it is whether the impact of the violation and the acts which are its concomitant and indeed its source, necessarily result in injury to the claimant; and whether the claimant is one who is protected by the anti-trust laws; that is, a competitor."
(Emphasis added)

Judged by those standards, the plaintiff is surely a competitor of the defendant, both of whom own films for distribution in the United States, and although the plaintiff chooses to distribute its film by engaging an independent contractor, while the defendant is an integrated company that handles its own distribution, still there can be no question that the parties are competing.

It is clear that the plaintiff is entitled to protection by the antitrust laws. Its injury is clearly caused by the defendant's actions, its damages are not speculative, nor are they cumulative, and, since the exhibitors and the distributor may not be able to show any loss

of profits from the inhibitions from exhibiting the plaintiff's film caused by defendant, to bar the plaintiff from collecting its damages could result in the wrongdoer being let off scott free. Such a result was deemed very unsatisfactory by the authors of the notes in 69 Harvard Law Review 575, 577 and 64 Col. L. Rev. See also In Re Western Liquid Asphalt Cases, supra. Yet, if the lower court's decision is upheld, that is precisely what is likely to happen here.

A perfect example of the way to avoid the mischief of blind denial of standing to classes of plaintiffs is found in Tugboat Inc. v. Mobile Towing Co., a Fifth Circuit decision, 534 F.2d 1171, 1177 (1976). The category involved in that case was "employees." Typically, employees are considered as remote plaintiffs who do not have standing under §4 to claim violations of the anti-trust laws directed against their employers. See Daly v. Quality School Plan, Inc., 380 F.2d 484, 487 (5th Cir. 1967). The court, in Tugboat, found, however, that the employees had standing "not because they suffered injuries as a result of their employer being victimized by violation of the antitrust laws, but because the conspiracy in this case was aimed at the employees as much as it was aimed at the employer." The court found that this ruling was not in conflict with the

Daly case, since the injury was not derivative and dependent upon the injury done to the employer. Thus the Fifth Circuit, unlike the lower court here, found no difficulty in distinguishing between a particular kind of plaintiff who, under some circumstances, might be seeking damages derivative to the real party in interest but in others might be the target of the wrongdoing. The case at bar is indistinguishable from Tugboat. See also Radovich v. NFL, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957).

The court below in relying on this court's ruling in Trico (supra) failed to observe the warning in Trico that:

"No hard and fast rule can be laid down in these situations as the line between direct and incidental damages is not always definable with clarity. All we here determine is that under the facts pleaded, appellant has no right to recover treble damages." 224 F. 2d at p. 680.

In Trico, there was no claim that the defendant was seeking to destroy the plaintiff's patents. Rather, the claim was that as a result of defendant's injury to the plaintiff's licensee, the plaintiff was injured. The plaintiff in Trico could probably pass the "provable injury" test, but not the "target" test. The plaintiff here can pass both tests as well as the Data Processing test. The only test plaintiff cannot pass is the "category" test adopted below.

The "category" test has never been adopted by this court. See Calderone, supra, 454 F.2d at p. 1296 n. 3; Trico, supra, 224 F.2d at p. 680; United Brands, supra, 358 F.Supp. at p. 1370. It has never been approved by the Supreme Court and has been roundly criticized virtually by all commentators.

The lower court failed to abide by the admonition of the Supreme Court announced in Pollier v. Columbia Broadcasting System, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 464, 82 S. Ct. 486 (1962), that summary dismissals of antitrust complaints should be used sparingly since trial by affidavit is no substitute for trial by jury. It was this admonition which prompted the Sixth Circuit in Malamud v. Sinclair Oil Corporation, 521 F.2d 1142, 1150 (1975) to warn against "a determination on the merits of a claim under the guise of assessing the standing of the claimant," stressing the fact that the "directness" of the injury involves a factual showing.

The "facts," as pleaded by the plaintiff here, show that the plaintiff has the exclusive license to distribute, exhibit, and otherwise exploit "Beyond the Door" in the United States and its territories; that it has engaged a distributor to distribute the film, that it has the right to

receive, in varying percentages, a portion of the gross receipts from such theatrical distribution; that "Beyond the Door" and the defendant's film, "The Exorcist" and its sequel, "Exorcist II," compete, that the defendant commenced a series of sham lawsuits and has threatened to conduct other lawsuits in bad faith and as an integral part of a scheme to restrain, monopolize, and intimidate actual and potential exhibitors in order to clear the marketplace of any motion pictures dealing with demonic possession when it releases "Exorcist II," all resulting in a destruction and diminution in the value of the plaintiff's property as well as loss of profits that would have been received from a further distribution of the film at times deemed optimum by its distributor. On the facts, plaintiff has standing to sue under Section 4.

II

THE NOERR-PENNINGTON DOCTRINE
DOES NOT APPLY TO SHAM LAWSUITS

The defendant asserted the so-called Noerr-Pennington doctrine as a complete barrier to the plaintiff's claim. Eastern Railroad Conf. v. Noerr Motor Freight, 365 U.S. 127 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

The decision of the Supreme Court in Trucking Unlimited v. Calif. Motor Transport Co., 404 U.S. 508, 514-15, 30 L. Ed. 2d 642, 648-9 92 S. Ct. 609 (1972) affirming 432 F.2d 755, 760 (9th Cir. 1970), disposes of the issue raised but not decided below about the application of the Noerr-Pennington doctrine. The Supreme Court held that the institution of court proceedings for the improper purpose of harassing competitors is a violation of the antitrust statutes. Even Noerr had held that sham suits would not be protected. 365 U.S. at p. 144. Thus, this contention cannot stand as an alternative basis for upholding the outcome below.

CONCLUSION

For the reasons set forth above, the decision

below should be reversed.

Respectfully submitted,

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BEYOND THE DOORADJUSTED PRODUCER'S REPORTSEPTEMBER 30, 1976

Film Rentals (Including Guarantees and advances) *	\$3,356,156
Less Co-op Advertising of \$525,428 Deleted (See Item #17, Page 8)	<u>-0-</u>
Gross Receipts	<u>\$3,356,156</u>
Producer's Share -	
Amount due to Zimmer Associates:	
-0- of first \$125,000	\$ -0-
35% of next 375,000	131,250
40% of next 500,000	200,000
45% of next 250,000	112,500
50% of balance	
of <u>2,106,156</u>	<u>1,053,078</u>
Sub-Total <u>\$3,356,156</u>	<u>1,496,828</u>
65% of Cable	
TV Sales 40,000	<u>26,000</u>
Total due to Zimmer Associates	<u>\$1,522,828</u>

* THIS INCLUDES REPORTING OF ALL ADVANCES ON HAND (SHOWN AS \$197,275 ON THE FILM VENTURES REPORT) EXCEPT FOR A RESERVE OF \$14,000 FOR ITEMS IN DISPUTE

Service of 2 copies of the
within Brief is hereby
admitted this 20th day of
April 1977
Signed Street & Street & Lavin by Linda Lury
Attorney for Defendant-Appellee